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No. 95-1352

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GARY EDWARDS AND TANA WOOD, *PETITIONERS*,

V.

JERRY BALISOK, *RESPONDENT*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. When a prisoner's claim under 42 U.S.C. § 1983 seeks only damages, and does not implicate the results of a disciplinary hearing or durations of confinement, are 28 U.S.C. 2254(b) exhaustion of state remedy requirements applicable.

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TO THE SUPREME COURT OF THE UNITED STATES:

Respondent, Jerry Balisok, appellant in cause No. 95-35307 and 95-35310 before the United States Court of Appeals for the Ninth Circuit, respectfully submits this Brief in Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW

The opinions below of the United States District Court for the Eastern District of Washington and the Court of Appeals for the Ninth Circuit are unreported. These opinions are reproduced and included in the Petition for Writ of Certiorari respectively as Appendix F and Appendix A.

STATEMENT OF THE FACTS

Respondent, Jerry Balisok, is an inmate at the Washington State Penitentiary (WSP). Because of his innate legal abilities, prison officers have marked Mr. Balisok as a "jail house attorney." Pet. for Cert. I-5. Prison officers at WSP have an unwritten policy to not date stamp witness statements received in support of jail house attorneys. Id. at I-4. The purpose of the unwritten policy is to allow prison officers to conceal exculpatory statements and then claim the document was submitted late or not submitted at all. *Id.*

On or about August 16, 1993, Mr. Balisok was charged with four infractions. *Id.* at I-3. On August 18, 1993, Mr. Balisok was notified that a disciplinary hearing would be conducted regarding the infractions. *Id.* In preparing for his defense, Mr. Balisok asked the hearing officer, Petitioner Edwards, to obtain a witness statements from inmate John Stein, and submit interrogatories to inmates Harris and Pulley. *Id.* at I-3, I-5. The hearing was later scheduled for September 2, 1993. *Id.* at I-3.

On August 19, 1993, inmate Stein signed the witness statement requested by Mr. Balisok and submitted it to WSP officials. *Id.* at I-4. The interrogatories were never submitted to inmates Harris or Pulley. *Id.* at I-6.

The infraction hearing was convened on September 2, 1993. *Id.* at I-3. During the hearing, Mr. Balisok requested the witness statement, and responses to interrogatories, be read into the record. *Id.* at I-4 - I-5. Officer Edwards told Mr. Balisok that inmate Stein did not submit a witness statement and that inmates Harris and Pulley refused to respond to the interrogatories. *Id.* Officer Edwards found Mr. Balisok guilty on all charges and sentenced him to ten days in

isolation, twenty days in administrative segregation and revoked 30 days earned good time credit. *Id.* at I-6.

On October 7, 1993, Mr. Balisok reviewed his central file and discovered that inmate Stein did in fact submit a witness statement. *Id.* at I-4. Inmate Stein's statement was hand written and dated August 19, 1993. *Id.* Mr. Balisok also discovered that WSP officers did not submit his interrogatories to inmates Harris or Pulley. *Id.* at I-6.

Mr. Balisok was found guilty of the infractions. He submitted an eight page appeal to prison Superintendent Wood, Petitioner herein, detailing the procedural defects surrounding the hearing. *Id.* at I-7. The appeal was rejected and returned to Mr. Balisok because it was too long. However, the appeal instruction do not set any specific page limit on the length of an appeal, rather the instructions merely suggest that an appeal "should" be two pages long. *Id.* Despite the suggestive, as opposed to mandatory, language of the appeal instructions, Mr. Balisok's appeal was never considered. *Id.* at I-7 - I-8.

PROCEDURAL HISTORY

In January 1994, Mr. Balisok filed a complaint in the United States District Court for the Eastern District of Washington against Petitioners Edwards and Wood under 42 U.S.C. § 1983 for violating of his due process rights under the Fourteenth Amendment to the United States Constitution. Pet. for Cert. App. H.

In response to this Court's holding in *Heck v. Humphrey*, 114 S. Ct. 2364 (1994), Mr. Balisok amended his Complaint in October, 1994. Pet. for Cert. App. I. In his amended complaint, Mr. Balisok alleged the Petitioner Edwards violated his due process rights by refusing to produce the witness statement of inmate Stein, failing to submit the interrogatories to inmates

Harris and Pulley, failing to specify what facts or evidence supported the finding of guilt, and failing to state grounds upon which to deny his appeal. *Id.* at I-9. Mr. Balisok alleges Petitioner Wood violated his due process rights by not accepting his appeal from the infraction hearing. *Id.* at I-9 - I-10. For relief, Mr. Balisok requested declaratory judgment that the procedures used by the Petitioner violated his constitutional right to due process, injunctive relief to prevent similar conduct in the future, and compensatory and punitive damages. *Id.* at I-10. Mr. Balisok specifically omitted any request for restoration of lost good time credits.

In February 1995, the District Court dismissed Mr. Balisok's complaint reasoning, "If the court should find that the disciplinary hearing at issue did violate Petitioner's due process rights, it would necessarily follow that the resulting sanctions, including the loss of good-time credit, were also unconstitutional and invalid. Pet. for Cert. at F-11. In a one page, unpublished, memorandum decision, the Court of Appeals for the Ninth Circuit reversed the District Court's decision reasoning Mr. Balisok's claim under § 1983 did not necessarily call into question the lawfulness of his conviction and therefore was not barred by *Heck*. Pet. for Cert. at A-2.

ARGUMENT

Petitioner argues that review of this case is necessary two reasons: First, Petitioners believe this Court's decision in *Heck* is unclear and therefore did not resolve the conflict in the Circuits resulting from *Preiser v. Rodriguez*, 411 U.S. 475 (1973) and *Wolff v. Mcdonnell*, 418 U.S. 539 (1974). Pet. for Cert. at 10, 13-17. Second, Petitioners argue that the appellate courts below have incorrectly adopted a per se rule "that a prisoner's challenge to a specific disciplinary hearing will never 'call into question' the resulting loss of good time as long as the

prisoner indicates that he is only challenging the procedures, and not the result, of the hearing." Pet. for Cert. at 17-18. Both of these arguments are incorrect.

Since this Court's unambiguous decision in *Heck* there is no indication in the opinions of the two Circuits to address the issue raised by Petitioners' Writ of any continuing difficulty or confusion about the availability of § 1983 relief for a prisoner seeking damages resulting from unconstitutional prison disciplinary procedures. In addressing the issue raised by Petitioners' Writ, the courts have adopted the correct rule for determining when a complaint is one for damages or is in fact an attack on the type or duration of confinement. *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995); *Armento-Bey v. Harper*, 68 F.3d 215 (8th Cir. 1995). See also, *Miller v. Indiana Dept of Corrections*, 1996 WL 44390 at 1 (7th Cir. 1996) (citing *Gotcher* and *Armento-Bey* with approval). Indeed, in both *Gotcher* and *Armento-Bey*, the courts rejected a per se rule to determine the availability of § 1983. Instead the courts correctly concluded the proper test regarding the availability of § 1983 prior to exhaustion of state remedies is whether the claim, if successful, would necessarily invalidate the underlying conviction. *Armento-Bey*, 68 F.3d at 216; *Gotcher*, 66 F.3d at 1099. These cases demonstrate that *Heck* has put to rest any confusion regarding the proper application of *Preiser* and *Wolff*. Accordingly, Petitioners' Writ for review of the unpublished Ninth Circuit memorandum decision below should be denied.

A. *Heck v. Humphrey* provides an unambiguous guide for when a prisoner's claim for damages is cognizable under 42 U.S.C. § 1983.

Contrary to the Petitioners' assertion, *Heck* has settled the conflict in the Circuits pertaining to the issue raised by Petitioners' Writ of Certiorari. Prior to the *Heck* decision, the lower courts had difficulty reconciling this Court's previous holdings in *Preiser* and *Wolff*. In *Preiser*, the plaintiff alleged the defendants unconstitutionally deprived him of good time credits and brought

suit under § 1983 seeking injunctive relief to restore the lost credits. *Preiser*, 411 U.S. at 476-77. The Court dismissed plaintiff's claim for injunctive relief because the claim was in essence a challenge to the fact or duration of confinement and therefore the exclusive remedy is habeas corpus with the necessary exhaustion requirement. *Id.* at 500. The policy driving the *Preiser* decision was concern of comity--that the state should have the first opportunity to corrects its own errors. *Id.* at 491-92.

One year later, this Court handed down the *Wolff* decision. In that case, the plaintiff prisoners sought damages and injunctive relief for unconstitutional prison disciplinary procedures. *Wolff*, 418 U.S. at 442-43. In *Wolff*, the Court reasoned that habeas was not an appropriate or available remedy for damages and therefore allowed the plaintiffs to pursue a cause of action under § 1983 without first exhausting state court remedies. *Id.* at 554. Specifically, the Court held "it was appropriate for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time credits." *Id.* at 555. The policy driving the *Wolff* decision appeared to be preserving the purpose of § 1983 to provide federal redress for arbitrary and oppressive abuses of government power. *Offet v. Solem*, 823 F.2d 1256, 1263 (8th Cir. 1987) (Arnold J., dissenting).

The confusion in the lower courts stemmed largely from the dicta in *Preiser* wherein the Court states, "[i]f a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or speedy release -- the traditional purpose of habeas corpus." *Preiser*, 411 U.S. at 494. The problems that

language created was evidenced by the Eight Circuit decision in *Offet*. Relying exclusively on the language of *Preiser*, the majority concluded the *Preiser* dicta establishes a bright line rule that any challenge to prison disciplinary proceedings under § 1983, regardless of the relief sought must be proceeded by exhaustion of state remedies. *Offet*, 823 F.2d at 1258. Conversely, Justice Arnold in his dissent, interpreted this passage as bright line, although arbitrary, rule that the availability of § 1983 for damages resulting from unconstitutional disciplinary procedures rests solely with the type of relief requested. *Id.* 1261. In other words, if a plaintiff sought only damages or prospective relief, he could proceed under § 1983 without first exhausting his state remedies. On the other hand, if the plaintiff sought restoration of good time credits, his remedy would necessarily be a Writ of Habeas Corpus.

The courts also had difficulty determining when a claim under § 1983 was an attack on the fact or duration of confinement requiring exhaustion under *Preiser*, or whether it was truly one for damages not requiring state remedy exhaustion under *Wolff*. The Second and Third Circuits believed the distinction rested with whether the plaintiff was challenging the manner by which the prison authorities reach their decision and not the outcome of their decision. *Georgevich v. Strauss*, 772 F.2d 1078, 1086-87 (3rd Cir. 1985); *Williams v. Ward*, 556 F.2d 1143, 1050-51 (2nd Cir. 1977) *cert. dismissed*, 434 U.S. 944 (1977). The Fifth Circuit drew the distinction "where the factual allegations of the complaint *could* give rise to habeas relief or to civil rights remedies." *Hernandez v. Spencer*, 780 F.2d 504, 505 (5th Cir. 1986). The Seventh Circuit adopted a more restrictive approach drawing the distinction with whether there is a direct and specific relationship between the challenged conduct and the prisoner's release date. *Hanson v. Heckel*, 791 F.2d 93, 96 (7th Cir. 1986). The Eighth Circuit dismissed *Wolff* entirely as being

inconstant with *Preiser* and adopted a per se rule that a prisoner must exhaust the available state remedies before bring a claim under § 1983 regardless of whether the relief sough is for restoration of good time credits or damages. *Offet*, 823 F.2d at 1258. The dissent in that case believed *Preiser* and *Wolff* required a per se rule that exhaustion was never required if the relief sought was only for damages. *Id.* at 1262.

This Court completely resolved the confusion in 1994 with *Heck v. Humphrey*. In *Heck*, this Court defined the proper scope and application of *Preiser*. *Heck*, 114 S.Ct. at 2369-70. The Court explained *Preiser* is limited to the holding that habeas corpus is the exclusive remedy for any claim challenging the fact or duration of confinement and nothing more. *Id.* In doing so, this Court dismissed as unreliable the dicta in *Preiser* and noted that any reference to *Preiser* as a guide for an issue of damages is misplaced. *Id.* By explaining the proper scope of *Preiser* and dismissing the problematic dicta, this Court remedied the majority of the confusion in the lower courts.

The Court also clarified and affirmed *Wolff's* holding. The Court explained that a claim for damages for using the wrong procedures, as opposed to reaching the wrong result, is cognizable under § 1983 without habeas exhaustion provided that the claim would not "necessarily vitiate the denial of good time credits." *Id.* at 2370. By setting forth the proper test to determine when a claim under § 1983 requires exhaustion of state remedies the Court resolved any remaining confusion the lower court may have had prior to *Heck*. The *Heck* decision provides a simple test for the lower courts to determine when a claim under § 1983 is an attack on the fact or duration of confinement, or one seeking only damages. As a result, the lower courts now have a clear and unambiguous guide to determine when a cause of action exists under § 1983 for damages

stemming from unconstitutional prison disciplinary procedures or when the prisoner must first exhaust his state remedies.

B. Since the *Heck* decision the lower courts have had no difficulty determining when a prisoner may bring a cause of action for unconstitutional prison disciplinary procedures under 42 U.S.C. § 1983.

Petitioners' argument that there is continuing confusion with this Court's holdings in *Preiser* and *Wolff* after the *Heck* decision is without merit or support. Petitioners' cite to ten Circuit Court cases as evidence of continuing confusion. Pet. for Cert. at 16-21. Seven of those ten cases were decided before *Heck* and are irrelevant for post-*Heck* analysis. The remaining three post-*Heck* cases cited are *Best v. Kelly*, 39 F.3d 328 (D.C. Cir. 1994), *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995) and *Armento-Bey v. Harper*, 68 F.3d 215 (8th Cir. 1995).

Petitioners' reliance on the *Best* decision in support of their argument of continuing confusion in the lower courts after *Heck* is in error. In *Best*, while the court affirmed the District Court's decision to dismiss plaintiff's claim under § 1983 insofar as it related to the restoration of good time credits, the court specifically expressed no opinion regarding the plaintiff's claims seeking damages. *Best*, 39 F.3d at 331. The D.C. Circuit has never addressed the issue raised by the Petition for Certiorari, nor has it given any indication that the court is having trouble interpreting the plain language of *Heck*.

The other two cases Petitioners rely on as evidence of continuing confusion in the lower courts after *Heck* are *Gotcher* and *Armento-Bey*. Although both *Gotcher* and *Armento-Bey* are on point, and decided after *Heck*, they demonstrate consistency in the lower courts and not confusion. Relying on *Heck* and *Wolff*, both courts explicitly adopted the proper rule set forth in *Heck* that a claim under § 1983 seeking damages is cognizable if the claim would not necessarily

invalidate the underlying conviction. *Gotcher*, 66 F.3d at 1099; *Armento-Bey*, 68 F.3d at 216. Both of these cases are consistent with each other and consistent with this Court's decision in *Heck*.

C. The Ninth Circuit did not adopt a per se rule that any claim seeking only damages is cognizable under § 1983 without exhaustion of state remedies

Relying on its previous holding in *Gotcher*, the Ninth Circuit reinstated Mr. Balisok's claim under § 1983, holding the claim "did not call into question the lawfulness of his continuing confinement" and therefore, was not barred by this Court's decision in *Heck*. Pet. for Cert. at A-2. Nothing in the one-page memorandum decision indicates that the Ninth Circuit has adopted a per se rule that a claim seeking only damages could proceed regardless of whether the claim demonstrates the invalidity of the disciplinary sanctions. *Id.* Indeed, the court specifically based its decision on *Heck* and concluded that allowing Mr. Balisok's claim to proceed under § 1983 would not necessarily invalidate the predicate infractions. *Id.*

In applying the correct standard for determining whether a claim is cognizable under § 1983, the Ninth Circuit in this case, in *Gotcher*, and the Eighth Circuit in *Armento-Bey*, reached the correct result. *Heck* makes it clear that a claim under § 1983 for damages resulting from unconstitutional prison disciplinary procedures may only proceed without requiring exhaustion of state remedies when a favorable determination of such a claim would not necessarily invalidate the underlying conviction. *Heck*, 114 S. Ct. at 2370. As this Court held in *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445 (1985) disciplinary sanctions resulting in the loss of good time credits will comport with the minimum requirement of due process provided the decision is supported by "some evidence." *Id.* Any

action challenging the fact or duration of confinement involves the review of the entire record. *Id.* at 455-56. Upon review of the entire record, if the court finds there is some evidence to support the conviction, the decision will stand. *Id.* at 455. Accordingly, under the *Heck* rule, a claim under § 1983 will invalidate the infraction decision resulting in the loss of good time credit only if upon review of the entire record, the claim would demonstrate there was *no* evidence to support the infraction.

In the State of Washington, the courts will uphold prison infractions decision which are only supported by some evidence. *In Re Anderson*, 112 Wn.2d 546, 772 P.2d 510 (1989); *In Re Johnston*, 109 Wn. 2d 493, 745 P.2d 864 (1987). In both of the those cases, the courts held that while the evidence presented may not have been sufficient in a non-prison setting, the minimal evidence presented by the prison officials satisfied the some evidence rule and therefore affirmed the convictions. *Anderson*, 112 Wn. 2d at 550; *Johnston*, 109 Wn. 2d at 499.

In the present case, there is some evidence by which the state court could affirm the decision to infract Mr. Balisok. Specifically, the investigation of Petitioner Edwards. Pet. for Cert. App. K. Accordingly, upon review, regardless of the procedural defects, a state court could affirm Mr. Balisok's conviction based on the some evidence rule. Therefore, even if Mr. Balisok's claim under § 1983 is successful, it will not necessarily invalidate the underlying conviction.

CONCLUSION

For there reasons, the Petition for Writ of Certiorari, should be denied.

Respectfully submitted,

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